

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

June 6, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 94-0986

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

BANK OF HOLMEN,

Plaintiff-Appellant,

v.

AMERICAN FAMILY LIFE INSURANCE COMPANY,

Defendant-Respondent,

**GIONELLI'S INC. d/b/a
GIONELLI'S PASTA WITH A TWIST,
WAYNE A. DYKSTRA,
AND DAVID CLARK,**

Defendants.

APPEAL from a judgment of the circuit court for La Crosse County: JOHN J. PERLICH, Judge. *Affirmed.*

Before Gartzke, P.J., Dykman and Sundby, JJ.

SUNDBY, J. The Bank of Holmen brought this action to enforce its rights under § 409.501, STATS., to replevy certain restaurant equipment. American Family Life Insurance Co. contested the Bank's claim. Just prior to a scheduling conference, the Bank and American Family agreed to settle the Bank's action against American Family. On April 26, 1993, the Bank's attorneys notified the trial court of the proposed settlement. Thereafter, the Bank transmitted to American Family a proposed Assignment of Judgment and Settlement Agreement and Release. On September 2, 1993, American Family sent to the Bank a redrafted Assignment of Judgment and Settlement Agreement. On September 20, 1993, the Bank informed American Family that the settlement documents, as revised, were acceptable. American Family did not transmit the settlement documents or settlement check to the Bank prior to November 4, 1993, when the Bank notified American Family that it was withdrawing its acceptance of the settlement offer.

The Bank justifies its failure to implement the stipulation on two grounds. First, it claims that the stipulation did not satisfy the requirements of § 807.05, STATS. We disagree.

Second, the Bank argues that even if the stipulation met the requirements of § 807.05, STATS., it could "revoke" it because of American Family's delay in implementing the stipulation. We conclude that the Bank's remedy was to enforce the stipulation, not to withdraw therefrom. We therefore affirm the judgment.

BACKGROUND

American Family claimed to own certain restaurant equipment as a result of its prior proceedings in the La Crosse County Circuit Court to satisfy a judgment against a debtor. The Bank claimed to have a security interest in such equipment superior to any ownership interests of American Family. The equipment was in the possession of American Family, which had foreclosed on a building in which the restaurant equipment was located.

The Bank began this action October 23, 1992, alleging that by virtue of its security interest in the restaurant equipment, it was entitled to

replevin. American Family filed an answer on December 4, 1992, denying that the Bank had a valid security interest in the equipment and alleging that any security obtained by the Bank was voidable as a fraudulent transfer.

In April 1993, American Family and the Bank negotiated a settlement agreement. American Family agreed to pay the Bank \$10,000 to avoid further litigation. In return, the Bank agreed to release any claim it had in the equipment and to partially assign its judgment against one of the restaurant owners to American Family. The parties agreed that the Bank's attorneys would prepare a first draft of the settlement documents. On April 26, 1993, the Bank informed the court that a settlement had been reached. On June 10, 1993, American Family wrote to the Bank's attorneys reminding them that American Family had still not received the settlement documents. In early July 1993, the Bank's attorneys orally promised to provide American Family with the settlement documents by July 7, 1993. However, they did not do so. Therefore, on July 13, 1993, American Family's attorneys again reminded the Bank's attorneys by letter that the settlement documents had not been received.

On July 27, 1993, American Family received draft settlement documents from the Bank's attorneys. American Family's attorneys informed the Bank that the form of the documents was not satisfactory in several respects. Between August 11, 1993 and September 1, 1993, the attorneys discussed the form of the documents and agreed that American Family's attorneys would prepare revised documents. On September 2, 1993, American Family's attorneys forwarded to the Bank's attorneys a revised form of the settlement documents. Between September 2, 1993 and September 20, 1993, the attorneys discussed several technical revisions to the settlement documents.

On September 20, 1993, American Family's attorneys sent a revised settlement agreement to the Bank's attorneys. On the same day, the Bank's attorneys orally informed American Family's attorneys that the additional revisions were acceptable. On September 24, 1993, the Bank's attorneys sent a letter to American Family's attorneys acknowledging that the form of the revised settlement agreement was acceptable. In that letter, the Bank's attorneys asked when the Bank could expect to receive payment and the settlement documents. In a September 28, 1993 letter to the Bank's attorneys, American Family's attorneys confirmed that all terms were agreed to and that "all parties have agreed to the form of the settlement documents." They

explained that American Family could not execute the settlement agreement and issue a check at that time because the American Family official knowledgeable and responsible for the matter was out of the country.

Relying on this settlement agreement, American Family negotiated a settlement agreement with the other parties involved. It is undisputed that the Bank was aware of this settlement.

While the settlement agreement with the Bank was being worked out, American Family was also negotiating with the City of La Crosse to settle personal property tax claims which the city had to the restaurant equipment. It is undisputed that the Bank was aware of these negotiations. The settlement agreement does not mention American Family's negotiations with the City.

American Family's letter of September 28, 1993, to the Bank's attorneys states:

Please be ... advised that we do not have any expectation that our settlement with the Bank of Holmen is contingent on any action the [La Crosse] City Council may take with respect to the property tax issue which we have discussed with the City Assessor. Therefore, we do not see that the City Council meeting [at] which the Assessor's recommendation will be acted upon, has any impact on our settlement.

On November 4, 1993, the Bank's attorneys informed American Family's attorneys by letter that, "I have been instructed by my client [the Bank] to withdraw our acceptance of the settlement offer in the above-referenced matter." The letter stated that the Bank understood that this matter would be resolved by October 15, 1993, and believed that because there was no correspondence, document and no check issued to the Bank, "[o]ur client believes that these have been deliberate tactics to delay this matter and, therefore, will no longer settle for the sum of \$10,000." In the Bank's attorneys' responsive letter of November 11, 1993, the attorneys stated: "As for your contentious claim that you have an enforceable settlement agreement, I spoke

with my client and his answer was, 'Tell it to the judge.' It is our intention, therefore, to amend our pleadings, file a claim of conversion and schedule this matter for trial."

Thereafter, American Family moved to strike the Bank's Amended Summons and Amended Complaint and to enforce the settlement agreement. In its order entered February 28, 1994, the trial court granted American Family's motion. At the hearing on American Family's motion, the Bank's attorneys acknowledged that there had been a settlement, at least until American Family tied in the settlement with American Family's resolution of its tax dispute with the City. The court concluded that both parties had been delinquent but that was not the issue. "The issue is whether or not it [the stipulation] was binding, and I believe it was. At that point in time if the bank was unhappy, they ... certainly could have brought a motion before the Court requesting the Court order enforcing the settlement."

DISCUSSION

A. REQUIREMENTS OF § 807.05, STATS.

The Bank argues that there was no enforceable stipulation under § 807.05, STATS., at the time it "revoked" its agreement. Section 807.05 provides:

No agreement, stipulation, or consent between the parties or their attorneys, in respect to the proceedings in an action or special proceedings shall be binding unless made in court or during a proceeding conducted under s. 807.13 or 967.08 and entered in the minutes or recorded by the reporter, or made in writing and subscribed by the party to be bound thereby or the party's attorney.

The Bank argues that compliance with § 807.05, STATS., must be determined as of the time the Bank's attorneys notified the trial court that the parties had "apparently" reached a settlement. That is not the law. In fact, no prior notice to the court was necessary. Section 807.05 permits parties to an action to stipulate in writing as long as the writing is subscribed by the party to

be bound thereby or the party's attorney. The Bank's attorneys in their letter of November 4, 1993, stated that a settlement agreement had been reached on September 14, 1993, and confirmed on September 20, 1993. The Bank's attorneys refer to the redrafting of the Settlement Agreement and Release. The concerns expressed by the Bank's attorneys were addressed in the revised agreement and release forwarded to the Bank's attorneys on September 20, 1993. By their letter of September 24, 1993, the Bank's attorneys clearly indicated that all that remained to be done at that time was a forwarding of the final document and payment. We conclude that the exchange of correspondence together with the revised agreement satisfied the requirements of § 807.05.

B. PROPERTY TAX CLAIM

The Bank argues that all that existed between the parties was a settlement offer and that it was justified in withdrawing its acceptance of American Family's offer because American Family added a condition--settlement with the City of La Crosse--unacceptable to the Bank. The Bank further argues that its goal of settling the litigation was frustrated by the actions of American Family in delaying the finalization of the negotiations and payment of the amount agreed upon until its goal of settling with the City had been achieved. However, the revised Settlement Agreement and Release forwarded to the Bank's attorneys on September 20, 1993, did not make settlement of the property tax claim a condition of settlement between the parties. Further, American Family made clear through its attorneys' letter of September 28, 1993, to the Bank's attorneys that its settlement with the Bank was not contingent on whatever action the City Council might take with respect to the property tax issue. We therefore reject the Bank's argument that American Family attempted to condition settlement of the action between the parties upon favorable action by the City Council with respect to the property taxes.

Finally, the Bank's attempt to justify its withdrawal from the settlement based on American Family's delaying tactics is without merit. The Bank's attorneys were advised that the American Family official responsible for this settlement was out of the country but that the matter would be resolved by October 15, 1993. Shortly over two weeks later, the Bank withdrew because of American Family's "deliberate tactics to delay this matter." Considering the length of these negotiations and the Bank's own procrastination, we reject the Bank's claim that American Family's delay in paying the Bank the amount of the

settlement was unreasonable. Further, as held by the trial court, the Bank's remedy was not to withdraw from the binding agreement but to enforce it.

By the Court. – Judgment affirmed.

Not recommended for publication in the official reports.